



ANPR Public Meeting

DFARS Case 2018-D071

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AIA and its member companies appreciate the opportunity to participate in the rulemaking process and provide input prior to the development of a proposed rule.

AIA commends the DAR Council for hosting public meetings and issuing ANPRs as a first step in the rulemaking process for critical policy issues such as data rights.

These additional steps enhance dialogue between Government and industry representatives on key policy issues and ensure DoD is as informed as possible about industry views and concerns, prior to developing its rulemaking approaches.

High-level comments provided today to be followed by written comments.

Statutory Changes

Implements new statutory preference for Specially Negotiated Licenses (SNLs) at 10 USC 2320(f):

“The Secretary of Defense shall, to the maximum extent practicable, negotiate and enter into a contract with a contractor for a specially negotiated license for technical data to support the product support strategy of a major weapon system or subsystem of a major weapon system. In performing the assessment and developing the corresponding strategy required under subsection (e) for such a system or subsystem, a program manager shall consider the use of specially negotiated licenses to acquire customized technical data appropriate for the particular elements of the product support strategy.”

Statutory Changes

Implements requirements in 10 USC 2439, Negotiation of price for technical data before development, production, or sustainment of major weapon systems:

“The Secretary of Defense shall ensure, to the maximum extent practicable, that the Department of Defense, before selecting a contractor for the engineering and manufacturing development of a major weapon system, production of a major weapon system, or sustainment of a major weapon system, negotiates a price for technical data to be delivered under a contract for such development, production, or sustainment.”

Topics for Written Comments

- Applicability of 10 USC 2439 and the new 10 USC 2320(f) preference for SNLs to commercial technical data, commercial computer software and SBIR data
 - Intent of the Federal Acquisition Streamlining Act (FASA)
 - Requirements of 41 USC 1906, 41 USC 1907 and 10 USC 2375
- Implementation of 10 USC 2439 to require negotiation of prices for technical data and computer software and rights in such data and software
 - 10 USC 2439 expressly applicable only to prices for technical data
 - Creates potential conflict with the prohibition at 10 USC 2320(a)(2)(H)(i) (i.e., government cannot require contractors to sell or otherwise relinquish rights in technical data as a condition of being responsive to a solicitation or as a condition for the award of a contract)

Topics for Written Comments, cont.

- Implementation of 10 USC 2439 requirements in DFARS 215.470 implies applicability to non-technical data (“...the contracting officer shall negotiate a price for data (including technical data and computer software”))
 - 10 USC 2439 expressly applicable only to technical data
 - 10 USC 2320 and 2321 and the implementing DFARS regulation do not provide for rights in non-technical data
- Enhance guidance at 215.470 prescribing the use of “appropriate intellectual property valuation practices and standards”
- Require good faith negotiations for prices in technical data and associated rights
- Add language to require or encourage communication with industry “early and often”

Topics for Written Comments, cont.

Other comments related to implementation of the preference for SNLs:

- Presumption as default vs. consideration
 - “Shall” vs. “should”
- Mandate for SNLs to “support the Government’s product support strategy...”
 - Statute requires the SecDef (to the maximum extent practicable) to execute SNLs to support the product support strategy
 - Statute does not place this requirement on the contractor
- DFARS 252.227-7015(b)(2) as mandatory minimum rights grant
 - Broad Government-wide (internal) license
 - Not mandated by statute
 - May discourage contractors, particularly non-traditional contractors, from doing business with the DoD, where tailoring (b)(2) rights to limit use and disclosure to DoD or specific services would mitigate contractor’s IP concerns

Topics for Written Comments, cont.

Other comments related to implementation of the preference for SNLs:

- Commercial software licenses are akin to SNLs
- “Specially” vs. “Specifically”
- SNLs are the result of negotiations; contractors are not required to assert a basis for an SNL
- DFARS 252.227-7017 does not apply to commercial technical data and software
- SNLs should be negotiated vs. presented on a take it or leave it basis
 - Contractor-proposed SNLs should not be considered deviations from solicitation terms
 - Contractor-proposed SNLs should not result in negative source selection evaluations
 - Clarify applicability to subcontractors
- Address modular open systems approaches (MOSA)

Closing Remarks

- Reviewing applicability of Section 813 Panel Report Recommendations, specifically Tension Point Paper 9
- Written comments forthcoming



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